No. 462.

Reply Br. of Def'n for M. to D.

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

No. 462.

COLUMBUS CONSTRUCTION COMPANY,
Plaintiff in Error,
vs.
CRANE COMPANY,
Defendant in Error.

Error to the United States Circuit Court for the Northern District of Illinois.

REPLY BRIEF ON MOTION TO DISMISS WRIT OF ERROR.

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Reply Brief on Motion to Dismiss Writ of Error.

The argument for plaintiff in error in opposition to the motion to dismiss is for the most part answered in our original argument.

It is urged that "the jurisdiction of this court in cases involving questions arising under the federal constitution" should not be "impaired by a narrow and illiberal construction of the Act of 1891."

But the very point in debate is whether the case *does* involve such a question; and the argument is not advanced by assuming the disputed point as the basis for a rule of construction that will support the assumption.

On examination it appears that it is plaintiff in error

who is contending for a literal and technical construction of the act, as against the reasonable construction on which our position is based.

In the first paragraph of our original argument (p. 13) we said:

> "The fact that a constitutional question may have been debated in the course of the trial is not the test."

Counsel for plaintiff in error now insist that that is the test, and thus the issue between us is defined.

It is possible to conceive of a literal and unreasoning construction of Section 5 of the Act of 1891 which shall make that the true test, and so include this case in the class of cases which are directly reviewable in this court. There is no disputing that in the course of the trial a statute of Indiana was "claimed to be in contravention of the constitution of the United States." That is all that the strict language of the statute requires if literally interpreted. In that view it is immaterial whether the claim of unconstitutionality was passed upon by the trial court at all, or even whether it was made in good faith. The mere fact that it was made is enough without more to give this court jurisdiction, and all expressions in the brief about a question "made and decided" in the trial court, and about a question having "a fair basis in law" are superfluous.

It is only from such a construction that the argument for plaintiff in error derives any plausibility. The moment we begin to place any limit whatever upon the broad sweep of the unqualified language used in the act, we reach limitations that must lead to the dismissal of this writ.

That this is the position of counsel for plaintiff in error, and that they do not shrink from the results of their own logic, appears in many expressions of the argument, but

nowhere more unmistakably than in the discussion of *Holder* v. *Aultman, Miller & Co.*, on pages 3 and 4 of the brief. Counsel there assume for illustration that the trial court, instead of holding the statute set up in defense to be unconstitutional, had held it, as this court did, to be inapplicable, and so, like this court, had declined to pass upon its constitutionality one way or the other and rendered judgment on the express ground of its irrelevancy. Counsel contend (less by argument, indeed, than by assertion: "It cannot be doubted," etc.), that in such a case the appeal would still have been to this court. We find it not only possible to doubt this conclusion but impossible to entertain it within the bounds of reason.

An interesting test may be applied by reversing the conditions. Adopting counsel's supposition that the trial court had refused to decide the constitutional question because the statute, valid or invalid, was inapplicable to the case, let us further suppose that a writ of error had been taken, not to this court, but to the Circuit Court of Appeals, and that a motion had been made there to dismiss the writ because a constitutional question was involved in the case. It seems to us impossible to contend successfully that the constitutional question is involved in the case supposed, so as to deprive the Court of Appeals of its jurisdiction. The test is exact and conclusive upon the converse question as presented in this court.

Reason and authority concur in limiting the meaning of the act far more narrowly than the position of plaintiff in error requires.

In the first place, if the act required only *the fact of a claim* that a statute is unconstitutional, there would be nothing to prevent counsel from bringing any case whatever to this court for review.

In the simplest action on a promissory note it would be open for counsel to make the claim that any statute which he might choose to select from the legislation of the state was in conflict with the federal constitution. It might be a section out of the criminal code, or an act relating to stock running at large, or any other obviously and ridiculously irrelevant statute; or it might be an act relating to the qualifications of the notary public who protested the note, or some other law which might be twisted into some more plausible relation to the subject-matter of the suit. But in either case the trial court would certainly decline to pass upon the constitutionality of a law which, constitutional or not, could have no effect upon the rights of the parties then before the court. That is what this court meant when it said in *Penn. Mutual Life Ins. Co.* v. *Austin*, 168 U. S., 685: "Of course the claim must be real and colorable, not fictitious and fraudulent." Here is at once a departure from the broad, sweeping literal interpretation of the act contended for by plaintiff in error; a perfectly proper and natural restriction, but none the less fatal to his contention. For, in the case supposed, whether fictitiously and fraudulently or in good faith, the exact letter of statute has been complied with, since the claim has been made on the record that a state statute conflicts with the federal constitution. The act does not confine the right of appeal to "a case in which the constitution or law of a state is *in good faith* claimed to be in contravention of the constitution of the United States." That requirement is very properly inserted by this court for its own protection, and for the enforcement of the distribution of appellate jurisdiction which Congress plainly had in mind. All that was said by Mr. Justice BREWER in *Forsyth* v. *Hammond* (quoted at pages 38, 39 of our former brief) about the mischief of a liberal policy in granting writs of *certiorari*, and thereby

defeating the purpose of Congress in the creation of the courts of appeal, is quite as pertinent when this court is urged to take jurisdiction on error of cases which Congress intended to assign to the court of appeals.

But if this court may, by construction, insert in the act a requirement of good faith, the literal and technical interpretation of plaintiff in error is gone. If the 5th Section does not cover every case included in its liberal terms, but only cases where the claim of constitutional protection is made in good faith, where shall the process stop? Certainly the question does not turn upon the state of mind of counsel, who make the claim of unconstitutionality. Some such claims, as we have said, will be obviously absurd, so that no man could make them in good faith. Others may appear to the experienced eye of a judge to be just as plainly irrelevant, and yet the less skillful practitioner who makes the claim may make it in entire good faith. It is not a question of motive or morals, but a question *whether the constitutional point is really and substantially involved in the case.* It is conceived that the later clause of Section 5, referring to cases "in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States" is not different in principle, with reference to the pending question, from the earlier clause relating to a case "that involves the construction and application of the constitution of the United States." Indeed, counsel for plaintiff in error treat the two phrases as equivalent for the purposes of this discussion, claiming that the case at bar "falls literally under both of these classifications."

If the constitutional question is not "involved" in the case within the meaning of the former clause, then the "claim" that the statute is unconstitutional is not made

within the meaning of the latter clause. The two must be tried by the same tests.

This is the view adopted by this court in the cases cited in our original brief, whereas, in the *Lennon* case it is said to be necessary to the jurisdiction of this court that "*the disposition of the case turned upon such constitution or law;*" or, as in the *Carey* case, that "the construction or application of the constitution of the United States *must be involved as controlling.*" These statements are no more a departure from literal interpretation of the statute than is the requirement of good faith, which is stated in the *Austin* case. Both are intended to make the act speak the real mind of Congress, viz.: that except in such grave and important cases as this court for special reasons shall take away from the Court of Appeals by *certiorari*, the appellate jurisdiction here shall be limited to cases where constitutional questions are fairly and substantially involved. Now whether the constitutional question which is urged by counsel in a given case is not fairly and substantially involved on error, because the claim was made without reasonable color of right, or because the statute assailed was clearly inapplicable, or was determined to be inapplicable on careful scrutiny, or because it bore upon a branch of the case which never went to final judgment at all in the court below, can make no possible difference in the construction of the statute. The law must furnish a reasonably certain guide to counsel in deciding which court is entitled to review the case. There is no half-way house between the absolute literalism which would give this court jurisdiction in every case of any claim of constitutional right, however foolish and ridiculous, and the construction which this court has adopted in the cases cited, excluding the jurisdiction of this court in cases

where the constitutional question is not fairly and substantially involved.

The comments of counsel on the *Lennon* and *Carey* cases are not greatly enlightening. The former is dismissed with the bare assertion that "the views here maintained are not inconsistent with the language quoted from the opinion;" which, perhaps, is sufficiently met by our assertion to the contrary. The cases cited in the *Lennon* opinion are quite as important as that opinion itself, and all assert what we are here insisting upon, that the constitutional question must be fairly and substantially in the case.

In the *Carey* case the general rule is again set forth, and it is as true here as there, that, in the final result, no constitutional question was *determined* by the Circuit Court, though such a question was in this case the subject of preliminary and inconclusive debate.

The citation of *L. & N. Ry.* v. *Louisville*, which counsel interprets as a "remarkable lapse" on our part, was not an inadvertence, as a careful reading of the context shows. The significant part of the quotation is in the words "that the decision sustained its validity;" *i. e.*, that the federal question entered into the judgment and was not merely the subject of inconclusive debate. The paragraphs immediately following disclaim the notion that a case coming from a state court is exactly parallel to one originating in the federal courts, but point out that after allowing for all differences,

> "it remains true * * * that the constitutional question must have been decided by the trial court, and must form at least an ingredient in the judgment rendered."

Reliance is placed upon two decisions of this court as

holding otherwise. The argument at this point betrays confusion about the application of the term "involved as controlling" as used for example in the *Carey* case. Counsel assume our contention to be that the constitutional question must be involved as controlling *in this court,* and then triumphantly cite the *Holder* and *Austin* cases to the contrary, where jurisdiction was taken and the cases were nevertheless disposed of without deciding the constitutional questions. This misapprehension was corrected as to the *Holder* case on page 36 of our original brief, and the same considerations apply to the *Austin* case. In both, the constitutional question was "involved as controlling" in the case *as determined below,* and it is the state of the case there that settles its destination on error.

In the *Holder* case, as we have seen, the lower court decided the statute in question to be unconstitutional, and made that decision the sole basis of its judgment. The contention in this court appears to have been that because the constitutional right had been upheld and not denied, this court was without jurisdiction; following the analogy of writs of error to state courts. It was not claimed or decided that the constitutional question was eliminated from the case by the existence of another ground on which the judgment could be supported. The record as made below involved the constitutional question and turned exclusively upon it, and this, it was held, gave jurisdiction to this court.

The necessities of counsel's position lead to strange statements about the *Austin* case, especially (p. 68) that

> "so far as the report of this case shows, no constitutional question was decided either by the Circuit Court or this court."

The truth is that the whole case was based on the assertion of rights under the federal constitution. If the complainant was not entitled to those rights, he did not pretend to be entitled to any others. A decree against him, on whatever ground, was therefore of necessity a denial of his claim, and so a final decision upon his constitutional rights.

In either the *Holder* or the *Austin* cases, this court might have decided the constitutional questions and disposed of the respective cases upon that decision. The fact that the court saw fit to dispose of the cases on other grounds does not change the fact that the *constitutional questions were controlling in the record as made up*, and that was enough to give this court jurisdiction. Neither case decides anything more than this.

In neither case was there any room for consideration of the question that arises in the case at bar, where the case was fully disposed of on its merits without ever reaching the questions which alone could be affected by the rulings on constitutional points.

It is argued with great insistence and in various forms of statement that

> "where a constitutional question is raised below, it is for this court to determine the collateral [*sic*] question how far it was controlling or affected the decision."

We have no quarrel with this statement. That is exactly what we are asking the court to determine, *on this motion*. To say that this court must hear the whole case on its merits in order to decide whether the constitutional question is sufficiently involved to give jurisdiction is indeed an inversion of sound thought.

> "The principle that error without prejudice will not reverse," says counsel, "has no application."

The principle is here invoked, not as bearing on the question of reversal or affirmance, but as leading to the corollary that error without prejudice *is not involved in the case on appeal* in any substantial way, within the meaning of the Act of 1891, or otherwise.

The line of argument by which counsel seek to show that the ruling of the trial court on the modified contract was prejudicial to plaintiff's right to recover, is most devious. What the Court of Appeals said on a former writ of error is copiously quoted, as if it belonged in this case; and even the authorities which were cited on that argument are here referred to on several points far away from the pending question. The whole contention is disposed of by the concessions on page 15 of the brief:

> "*Both courts* (Appeals and Circuit) *seem to have held the Construction Company was entitled to pipe such as the contract called for.* * * * [The ruling on the modified contract and the Indiana statute] *was a ruling only upon the question of damages.*

That is the whole substance of our contention on this point, and by the concession no room is left for the operation of the Indiana statute, except on the question of damages, where it was immaterial.

The second branch of our argument for dismissal is answered very incidentally (p. 7) by assuming that it was based on a claim of waiver, *made in this case.* Our position, as we supposed we had made clear, is that the question of waiver or non-waiver, and all other questions about the Indiana statute, are *not proximate to the controversy in this case.* The illustration on page 34 of our former brief remains a complete and unanswered expression of our view on this subject.

The haste with which this reply is necessarily prepared must be our apology for some repetition and lack of order, and the importance of the question presented, for what may appear to be an unnecessary fullness of discussion.

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